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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA**

SellPoolSuppliesOnline.com, LLC,)	CASE NO.: CV-15-01856-PHX-PGR
Plaintiff)	
v.)	PLAINTIFF'S SEPARATE
)	STATEMENT OF FACTS IN
Ugly Pools Arizona, Inc.; Brian)	SUPPORT OF PLAINTIFF'S
Morris, an individual)	SECOND MOTION FOR
Defendant)	SUMMARY JUDGMENT

1. Plaintiff, SellPoolSuppliesOnline.com ("SPSO") facilitates the online presence and online store of numerous swimming pool contractors and parts suppliers throughout and around Arizona by licensing its website platform ("Platform"), located on the Internet at www.sellpoolsuppliesonline.com. See Exhibit 1, Declaration of Aaron Hagen ("Hagen Decl.") ¶3.

2. The Platform consists of, *inter alia*, a compilation of programs, representations, originally authored works, writings, hundreds of photos taken by the principals of SPSO, and computer architecture and design, which provide SPSO licensees the

1 infrastructure to configure, implement, and maintain fully functional and attractive
2 websites based on the Platform that are personalized to each customer's business,
3 incorporate and effectively use search engine optimization (“SEO”), and provide
4 “drop-ship” delivery that dispenses with the need to maintain inventory. *See Exhibit 1*,
5 Hagen Decl. ¶4.
6

7
8 3. SPSO spent three (3) years and hundreds of thousands of dollars to develop the
9 Platform. *See Exhibit 1*, Hagen Decl. ¶5.

10 4. SPSO first published the Platform on or about July 3, 2014. The SPSO Platform
11 is password protected and available only to licensees who register and pay for use and
12 access. *See Exhibit 1*, Hagen Decl. ¶6.
13

14 5. In or about mid-July 2014 Plaintiffs employed Mark Kesler (“Kesler”) as a
15 salesperson. *See Exhibit 2*, Deposition of Mark Kesler (“Kesler Depo.”) 20:19-22,
16 21:13-15.
17

18 6. It was Kesler’s job to sell licenses to use the Platform. These licenses sold for
19 on average \$15,000. *See Exhibit 2*, Kesler Depo. 20:19-22, 53:14-16; *See also Exhibit*
20 *1*, Hagen Decl. ¶6.
21

22 7. Plaintiffs additionally charged monthly maintenance fees and required licensees
23 to host their sites on SPSO servers. *See Exhibit 6*, AllPoolAndSpaParts.com Website
24 Platform Subscription Agreement signed by Mark Kesler (admitted as exhibits to both
25 Kesler and Morris depositions).
26
27
28

1 8. Kesler was paid a commission for each license he sold and ultimately purchased
2 a license for use on his own site, “www.allpoolandspaparts.com” (“Kesler’s site”). *See*
3 Exhibit 2, Kesler Depo. 32:7-9, 53:17-18.
4

5 9. The license was exclusively for “www.allpoolandspaparts.com” and pursuant to
6 its terms, was subject to the SPSO Terms of Service. *See* Exhibit 6, page 2,
7 AllPoolAndSpaParts.com Website Platform Subscription Agreement.
8

9 10. The Terms of Service, provided in relevant part, “Subscribers are provided use,
10 NOT ownership, of a pre-constructed website hosted by SPSO, and accessed through a
11 domain name provided by SPSO.” *See* Exhibit 6 page 6, Terms of Service ¶ 1.
12

13 11. The Terms of Service further provided “You shall not modify, alter, copy,
14 distribute, transmit, display, reproduce, publish, license, broadcast, create derivative
15 works from, transfer, or sell, SPSO Content. Systematic retrieval of data or other
16 SPSO Content from the Platform or www.sellpoolsuppliesonline.com to prepare any
17 collection, compilation, database, or directory is strictly prohibited.” *See* Exhibit 6
18 page 8, Terms of Service ¶10(C).
19

20 12. Under the Terms of Service, subscribers did not have the right to “assign, by
21 contract, operation of law or otherwise, the license or any of the rights, interests, or
22 obligations” thereunder. *See* Exhibit 6 page 12, Terms of Service ¶17(B).
23

24 13. At some point in mid-2014, Kesler introduced his friend, Brian Morris, owner
25 of Ugly Pools Arizona, Inc. and the trade name “We Fix Ugly Pools” (hereinafter
26 “Defendants” or “WFUP”) to SPSO as a potential licensee. *See* Exhibit 2, Kesler
27 Depo. 59:12-17.
28

1 14. Defendants are in the business of building and remodeling swimming pools, as
2 well as selling pool supplies and accessories in and around greater Maricopa County.
3 *See* Exhibit 3, Deposition of Brian Morris (“Morris Depo.”) 8:18-19, Exhibit 2, Kesler
4 Depo 20:7-8.

6 15. Defendants represented themselves to SPSO as prospective customers/licensees
7 who were honestly considering the license of SPSO’s Platform in order to create a
8 website for their business based on same. *See* Exhibit 1, Hagen Decl. ¶7, *see also*
9 Exhibit 2, Kesler Depo 54:17-22, 59:14-15.

11 16. Defendants were provided access to Kesler’s copy of the server for the limited
12 purpose of familiarizing themselves with the Platform and to assist Defendants in
13 making a purchasing decision. Defendants were aware they would have to purchase a
14 license to be authorized to have further access to the Platform, to use it commercially,
15 and that the SPSO license governed the nature of their use of the Platform. *See* Exhibit
16 5, Deposition of Aaron Hagen (“Hagen Depo.”) 67:7-68-7.

19 17. Defendants were in close contact with Kessler and SPSO management and
20 pressed for very detailed, confidential information about SPSO’s Platform and its
21 underlying functionality under the pretense of purchasing a license and entering into a
22 long term commercial relationship for maintenance and support with SPSO. *See*
23 Exhibit 5, Hagen Depo. 67:7-68:7, *see also* Complaint Exhibit A.

26 18. Unbeknownst to Plaintiff, Defendants and Kesler were working together and
27 had formed a partnership in order for Defendant Morris to manage and redesign
28 Kesler’s Site. *See* Exhibit 2, Kesler Depo. 37:4-7.

1 19. Defendants have admitted to accessing SPSO's Platform by logging into
2 SPSO's server and downloading a complete copy of SPSO's Platform, on or about
3 September 14, 2014. *See Exhibit 3*, Morris Depo. 88:3-12; *see also* Complaint Exhibit
4 B.

5
6 20. After a complete copy of SPSO's platform was downloaded, Defendants
7 immediately ceased all communications with SPSO. *See Exhibit 1*, Hagen Decl. ¶ 8.

8
9 21. Nearly a year later, Plaintiffs discovered Defendants had published a website
10 located at www.allpoolsupplies.com, ("APS") which was nearly identical to the
11 Platform. *See Exhibit 7*, email from Aaron Hagen to Brian Morris regarding his
12 discovery of APS; *see also* Complaint exhibits C, D, E, F showing identical images
13 and arrangement.

14
15 22. Defendants have admitted to copying the Platform and creating a derivative site,
16 APS. *See Exhibit 4*, Defendants' response to Plaintiff's Request for Admissions, No.7-
17 8; *see also Exhibit 3*, Morris Depo. 49:6-17.

18
19 23. Defendants have also admitted to going live with APS ostensibly as a "test
20 site." *See Exhibit 3*, Morris Depo. 19:17-20:1 71:1-16.

21
22 24. However, the "test site" was launched live on the internet as a fully functioning
23 site through which customers could, and did place orders. *See Exhibit 3*, Morris Depo.
24 19:13-16.

25
26 25. This site was live concurrent with Kesler's site, was independently hosted by
27 Defendants (i.e. not on Plaintiff's server), and had a separate license through
28

1 BigCommerce for back end services. *See* Exhibit 3, Morris Depo. 19:13-16, 16:25-
2 17:10.

3
4 26. In other words, it was not just a second URL that redirected customers to
5 Kesler's site, a permissible use under Kesler's license, but rather, it was a completely
6 independent, wholly unrelated, unlicensed site. *See* Exhibit 2, Kesler Depo. 52:9-15,
7 56:2-4.

8
9 27. Neither Defendants nor Kesler ever informed Plaintiff of their partnership, nor
10 of their derivative use of the site. *See* Exhibit 2, Kesler Depo. 86:7-9; *see also* Exhibit
11 3, Morris Depo. 36:10-12.

12
13 28. While creating the derivative site ("Derivative Site"), Defendants wholly
14 incorporated the original photos as published on July 3, 2014 and registered with the
15 U.S. Copyright Office ("USCO") under registration number TX 8-268-803 into the
16 Derivative Site and incorporated other content from the Platform into same. *See*
17 Exhibit 3, Morris Depo. 44:1-10, 71; *see also* Complaint Exhibits E and F.

18
19 29. Registration number TX 8-268-803 remained a valid USCO registration post
20 the USCO's response dated September 5, 2017. *See* Doc. 72.

21
22 30. Kesler's license was granted specifically for use on his site located at
23 allpoolandspaparts.com. The license strictly limited use of the Platform. *See generally*
24 Exhibit 6.

25
26 31. Defendants admit to never having seen, let alone reviewed Kesler's license
27 which purportedly permitted them to replicate and publish, and "do whatever it took"
28 to improve Kesler's site. *See* Exhibit 3 Morris Depo. 64:21-65:1.

1 32. Had Defendants bothered to read the license, they would have discovered that
2 any copying, derivative works, republishing of the Platform was prohibited. *See*
3 Exhibit 6 page 8, Terms of Service ¶10(C).
4

5 33. While Defendants assert that they copied, altered, and published APS with the
6 consent of Kesler, Kesler has denied granting consent to make a live copy of his site.
7 *See* Exhibit 3, Morris Depo. 31:6-32:4; *see also*, Exhibit 2, Kesler Depo. 29:4-13.
8

9 34. Kesler did not have the right to copy the site or to publish a derivative site,
10 therefore he could not have given such authorization to Defendants. Any such use
11 exceeded the scope of Kesler's license. *See* Exhibit 6 page 8, Terms of Service ¶10(C).
12

13 35. SPSO discovered Defendants' infringing website on or about July 15, 2015 and
14 promptly notified Defendants of infringement on that same day. *See* Exhibit 7, email
15 from Aaron Hagan to Brian Morris dated July 15, 2015.
16

17 36. Defendants did not respond to SPSO's notification or otherwise communicate
18 with SPSO regarding the theft of SPSO's property. *See* Exhibit 3, Morris Depo. 91:24-
19 92:2.
20

21 37. SPSO never entered into any agreement, express or implied, with Kesler or
22 Defendants that would permit Defendants to adapt or otherwise use the Platform. *See*
23 Exhibit 5, Hagan Depo. 65:3-7; 66:19-21.
24

25 38. Neither Kesler nor Defendants ever discussed the legality of their actions with
26 an attorney. *See* Exhibit 3, Morris Depo. 53:25-54:3.
27
28

1 39. Plaintiff's U.S. Copyright Office ("USCO") registration numbered TX 8-268-
2 803 only registered "text and photographs." *See Exhibit 8*, USCO certificate of
3 registration.

4 40. The Internet Archive ("IA") contains Plaintiff's photographs that were
5 published on July 3, 2014; a representative sample of these same IA photographs were
6 found to exist in the deposit Plaintiff provided the USCO as part of registration number
7 TX 8-268-803, and likewise exist in Defendants' copy of Plaintiff's website taken
8 prior to the commencement of this action. *See Exhibit 9*, Affidavit of Martin F.
9 Gwynn; *see also Exhibit 10* Parts 1-3, comparison of photographs across the respective
10 mediums.

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15 Dated: September 27, 2017

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